O REPORT | O SECOND SESSION | O THIRTY-NINTH PARLIAMENT

Special Committee to Appoint an Information and Privacy Commissioner

LEGISLATIVE ASSEMBLY
PROVINCE OF BRITISH COLUMBIA

MAY 2010

May 6, 2010

To the Honourable
Legislative Assembly of the
Province of British Columbia

Honourable Members:

We have the honour to present herewith the Report of the Special Committee to Appoint a Information and Privacy Commissioner containing our unanimous recommendation.

Respectfully submitted on behalf of the Committee,

Stephanie Cadieux, MLA
Chair

Leonard Krog, MLA
Deputy Chair

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Composition of the Committee

Members

Stephanie Cadieux, MLA	Chair	Surrey-Panorama
Leonard Krog, MLA	Deputy Chair	Nanaimo
Rob Howard, MLA		Richmond Centre
John Les, MLA		Chilliwack
Doug Routley, MLA		Nanaimo-North Cowichan

Clerk to the Committee

Craig James, Clerk Assistant and Clerk of Committees

Research Staff

Josie Schofield, Manager, Committee Research Services

Terms of Reference

On February 10, 2010, the Legislative Assembly agreed that a Special Committee be appointed to select and unanimously recommend to the Legislative Assembly, the appointment of an Information and Privacy Commissioner, pursuant to Section 37 (1) of the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c. 165) and that the Special Committee so appointed shall have the powers of a Select Standing Committee and is also empowered:

a. to appoint of their number, one or more subcommittees and to refer to such subcommittees any of the matters referred to the committee;

b. to sit during any period in which the House is adjourned, during the recess after prorogation until the next following Session and during any sitting of the House;

c. to adjourn from place to place as may be convenient;

d. to retain such personnel as required to assist the Committee;

and shall report to the House as soon as possible, or following any adjournment, or at the next following Session, as the case may be; to deposit the original of its reports with the Clerk of the Legislative Assembly during a period of adjournment and upon the resumption of the sitting of the House, the Chair shall present all reports to the Legislative Assembly.

Acknowledgements

Since 1999, David Loukidelis has provided outstanding leadership in the field of access to information and privacy protection. Nearing the end of his second term of office, on January 19, 2010, Mr. Loukidelis left his position as Information and Privacy Commissioner to become Deputy Attorney General.

On behalf of all Members of the Legislative Assembly, the Special Committee would like to acknowledge the exceptional contributions Mr. Loukidelis has made during his tenure as an independent Officer of the Legislature. These include managing with considerable acumen and tact the expansion of his office's oversight responsibilities, and using his impressive communication skills to educate legislators and the public about the access and privacy field, in Canada and internationally.

We would like to express our sincere appreciation to David and wish him well in his new endeavour.

Introduction

The Information and Privacy Commissioner is an independent officer of the Legislature, with the responsibility of monitoring how three statutes are administered: the *Freedom of Information and Protection of Privacy Act* (RSBC 1996, c. 165), *Personal Information Protection Act* (SBC 2003, c. 63) and the *Lobbyists Registration Act* (SBC 2001, c. 42).

Section 37(1) of the *Freedom of Information and Protection of Privacy Act* describes the procedure for the appointment of the Information and Privacy Commissioner. It stipulates that, "On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as the Information and Privacy Commissioner a person who has been unanimously recommended by a special Committee of the Legislative Assembly for the appointment."

This procedure was used for the first time, in 1993, to appoint the province's first Information and Privacy Commissioner, David Flaherty, to a non-renewable term of six years.

In 1999, the search for a new Commissioner was conducted by an all-party special committee that made the unanimous recommendation to appoint David Loukidelis as the second Information and Privacy Commissioner for British Columbia for a non-renewable term of six years. The ban on a second term of office was repealed in January 2005. Later that year, an all-party special committee recommended that Mr. Loukidelis be reappointed. His second term dated from November 24, 2005 up until his resignation, effective January 26, 2010.

This report contains the Special Committee's unanimous recommendation to the Legislative Assembly regarding the appointment of the province's third Information and Privacy Commissioner.

Meeting Schedule

During the second session, the recruitment of the new Information and Privacy Commissioner covered the period between February 11 and April 21, 2010. In addition to informal discussions to plan and conduct the recruitment process, five formal meetings were held for the following purposes:

Thursday, February 11, 2010	Organizational Meeting
Tuesday, March 30, 2010	Briefing Selection of candidates to interview
Wednesday, April 14, 2010	Short-list candidate interviews
Monday, April 19, 2010	Short-list candidate interviews
Wednesday, April 21, 2010	Deliberations Adoption of Report

Recruitment Process

On February 11, 2010, the Special Committee to Appoint an Information and Privacy Commissioner held its organizational meeting and elected the Chair and Deputy Chair. The advertisement for the position was also reviewed and approved at that meeting.

As part of the preliminary planning process, the Special Committee, with assistance from the Office of the Clerk of Committees, carried out a variety of administrative and procedural tasks related to selection criteria, advertising placement, processing of applications, preparation of position profile and screening matrix, drafting of interview questions, and reference checks.

Between February 19 and February 28, an advertisement was placed in British Columbia's daily newspapers and selected weeklies, and the National Post inviting applications for the position of Information and Privacy Commissioner. A copy of the advertisement is in Appendix A.

The Special Committee received 46 applications for the position of Information and Privacy Commissioner by the March 12 deadline; 36 were submitted by residents of British Columbia, three from Alberta and seven from Ontario. Six applicants were short-listed, based on their knowledge of legal principles, mediation, relevant legislation, parliamentary government and topical issues; and experience in a senior-level management position in a complaints-handling body.

In preparation for the interviews, the Special Committee arranged to be briefed by the former Commissioner, David Loukidelis, on the role and responsibilities of the position and the desirable qualifications to look for in a candidate. This briefing took place on March 30, 2010.

Six interviews were conducted on April 14 and 19. Each candidate was asked the same set of questions to ensure consistency.

On April 21, the Special Committee deliberated carefully on the skill set of each short-listed candidate before selecting the person to recommend as the next Information and Privacy Commissioner for British Columbia.

The final part of the recruitment process involved a preliminary orientation. On May 3, the recommended candidate had a series of meetings with MLAs serving on relevant parliamentary committees, the Speaker, the Clerk of Committees, the A/Commissioner and former Commissioner.

Recommendation

The Special Committee unanimously recommends to the Legislative Assembly that Ms. Elizabeth Denham be appointed to the position of Information and Privacy Commissioner, pursuant to section 37(1) of the *Freedom of Information and Protection of Privacy Act*.

Biographical Information

Elizabeth Denham was appointed Assistant Privacy Commissioner of Canada in 2007, with primary responsibility for the federal private sector privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Ms. Denham has extensive experience in the privacy and access field from the perspectives of both government and private sector, including several years of senior level leadership in provincial and municipal governments, as well as health and regulatory organizations in Alberta.

From 2003 to 2007, Ms. Denham was Director, Private Sector, for the Office of the Information and Privacy Commissioner of Alberta. In this role, she established and directed the compliance and enforcement program for Alberta's private sector privacy law. She has extensive speaking experience at conferences and industry meetings, and organized the inaugural Alberta-BC Private Sector Privacy Conference.

From 2001 to 2003, Ms. Denham ran her own privacy policy consulting business that included public sector and private sector clients in Alberta, British Columbia, Manitoba and Ontario. Working with the Calgary Health Region from 1997 to 2001, she held the positions of Information and Privacy Coordinator and Director, Legal and Regulatory Affairs. Ms. Denham also served as the public member on the Research Ethics Board, University of Calgary.

Prior to her work in the privacy field, Ms. Denham directed the archives programs and established new information management programs for the City of Calgary and the City of Richmond (B.C.).

A native of British Columbia, she holds degrees in history (Bachelor of Arts) and archival and information science (Masters of Arts) from the University of British Columbia.

Elizabeth is married, with four grown children. She strives to stay fit with running and yoga, in between meetings and flights across Canada.

Appendix A: Advertisement

LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

Special Committee to Appoint an Information and Privacy Commissioner
Stephanie Cadieux, MLA *Chair* Leonard Krog, MLA *Deputy Chair*

Information and Privacy Commissioner

An all-party Special Committee of the Legislative Assembly has been asked to select and recommend the appointment of an Information and Privacy Commissioner for the Province of British Columbia. The Committee invites qualified candidates to submit their resumes for consideration.

British Columbia's *Freedom of Information and Protection of Privacy Act* (RSBC 1996 c. 165) provides the public with the right of access to the records of government and other public bodies, and establishes an individual's right to the protection of personal information.

The Commissioner investigates and attempts to resolve complaints regarding compliance with the *Act*. These duties are carried out through the management of a group of professional and support staff.

The Information and Privacy Commissioner is designated as the Registrar under the *Lobbyist Registration Act* ("LRA"). The functions of the Registrar include registering lobbyists, conducting administrative investigations into LRA compliance, and promoting awareness of registration requirements.

A statutory officer of the Legislative Assembly, the Information and Privacy Commissioner must uphold the values of access to information and privacy, with the proper balance, when necessary, between the public's right to information and an individual's right to confidentiality. The Commissioner should possess a thorough understanding of relevant legal principles, and of the separate values of openness and privacy, as well as experience in mediation, senior level decision-making and administration.

The Information and Privacy Commissioner is appointed for a six year term and may be renewed.

Resumes should be received by email at the address below no later than **Friday, March 12, 2010**. Only those who are invited for an interview will be contacted. Resumes received will be held in confidence.

FOR FURTHER INFORMATION PLEASE CONTACT

Craig James
Clerk Assistant and
Clerk of Committees
Room 224, Parliament Buildings
Victoria, BC V8V 1X4

Toll free in BC: 1-877-428-8337
Tel: 250-356-2933 (collect)
E-mail: clames@leg.bc.ca
www.leg.bc.ca/cmt

Appendix B: *Freedom of Information and Protection of Privacy Act* [RSBC 1996] CHAPTER 165

Part 4 — Office and Powers of Information and Privacy Commissioner

Appointment of commissioner

37 (1) On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as the Information and Privacy Commissioner a person who has been unanimously recommended by a special Committee of the Legislative Assembly for the appointment.

(2) The commissioner is an officer of the Legislature.

(3) Subject to section 38, the commissioner holds office for a term of 6 years.

(4) [Repealed 2005-25-1.]

Resignation, removal or suspension of commissioner

38 (1) The commissioner may resign at any time by notifying the Speaker of the Legislative Assembly or, if there is no speaker or the speaker is absent from British Columbia, by notifying the clerk of the Legislative Assembly.

(2) The Lieutenant Governor in Council must remove the commissioner from office or suspend the commissioner for cause or incapacity on the recommendation of 2/3 of the members present in the Legislative Assembly.

(3) If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the commissioner for cause or incapacity.

Acting commissioner

39 (1) The Lieutenant Governor in Council may appoint an acting commissioner if

(a) the office of commissioner is or becomes vacant when the Legislative Assembly is not sitting,

(b) the commissioner is suspended when the Legislative Assembly is not sitting,

(c) the commissioner is removed or suspended or the office of the commissioner becomes vacant when the Legislative Assembly is sitting, but no recommendation is made by the Assembly under section 37 (1) before the end of the session, or

(d) the commissioner is temporarily absent because of illness or for another reason.

(2) An acting commissioner holds office until

(a) a person is appointed under section 37 (1),

(b) the suspension of the commissioner ends,

(c) the Legislative Assembly has sat for 20 days after the date of the acting commissioner's appointment, or

(d) the commissioner returns to office after a temporary absence,

whichever is the case and whichever occurs first.

Salary, expenses and benefits of commissioner

40 (1) A commissioner appointed under section 37 (1) or 39 (1) is entitled

(a) to be paid, out of the consolidated revenue fund, a salary equal to the salary paid to the chief judge of the Provincial Court, and

(b) to be reimbursed for reasonable travelling and out of pocket expenses personally incurred in performing the duties of the office.

(2) The Lieutenant Governor in Council may, on terms and conditions the Lieutenant Governor in Council specifies, order that the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to the commissioner.

(3) If an order is made under subsection (2), the Public Service Pension Plan applies subject to subsection (4).

(4) When calculating the amount of a pension under the Public Service Pension Plan, each year of service as commissioner must be counted as 1 1/2 years of pensionable service.

(5) [Repealed 2003-62-2.]

Staff of commissioner

41 (1) The commissioner may appoint, in accordance with the *Public Service Act*, employees necessary to enable the commissioner to perform the duties of the office.

(2) The commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.

(3) The *Public Service Act* does not apply in respect of a person retained under subsection (2).

(4) The commissioner may make a special report to the Legislative Assembly if, in the commissioner's opinion,

(a) the amounts and establishment provided for the office of commissioner in the estimates, or

(b) the services provided by the BC Public Service Agency

are inadequate for fulfilling the duties of the office.

General powers of commissioner

42 (1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations and audits to ensure compliance with any provision of this Act,

(b) make an order described in section 58 (3), whether the order results from an investigation or audit under paragraph (a) or an inquiry under section 56,

(c) inform the public about this Act,

(d) receive comments from the public about the administration of this Act,

(e) engage in or commission research into anything affecting the achievement of the purposes of this Act,

(f) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies,

(g) comment on the implications for access to information or for protection of privacy of automated systems for collection, storage, analysis or transfer of information,

(h) comment on the implications for protection of privacy of using or disclosing personal information for record linkage,

(i) authorize the collection of personal information from sources other than the individual the information is about, and

(j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.

(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed under this Act has not been performed,

(b) an extension of time for responding to a request is not in accordance with section 10 (1),

(c) a fee required under this Act is inappropriate,

(d) a correction of personal information requested under section 29 (1) has been refused without justification, and

(e) personal information has been collected, used or disclosed in contravention of Part 3 by

(i) a public body or an employee, officer or director of a public body, or

(ii) an employee or associate of a service provider.

Power to authorize a public body to disregard requests

43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that

(a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests, or

(b) are frivolous or vexatious.

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;

(b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

(3.1) The commissioner may require a person to attempt to resolve the person's request for review or complaint against a public body in the way directed by the commissioner before the commissioner begins or continues an investigation under section 42 or an inquiry under section 56.

(3.2) Subsection (3.1) applies whether or not a mediator has been authorized under section 55.

(4) If a public body is required to produce a record under subsection (1) and it is not practicable to make a copy of the record, the head of that public body may require the commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the commissioner must return any record or any copy of any record produced by the public body concerned.

Maintenance of order at hearings

44.1 (1) At an oral hearing, the commissioner may make orders or give directions that he or she considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the commissioner may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the commissioner, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a hearing, and

(b) exclude a person from further participation in or attendance at a hearing until the commissioner orders otherwise.

Contempt proceeding for uncooperative person

44.2 (1) The failure or refusal of a person subject to an order under section 44 to do any of the following makes the person, on application to the Supreme Court by the commissioner, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court:

(a) attend before the commissioner;

(b) take an oath or make an affirmation;

(c) answer questions;

(d) produce records in the person's custody or under the person's control.

(2) The failure or refusal of a person subject to an order or direction under section 44.1 to comply with the order or direction makes the person, on application to the Supreme Court by the commissioner, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the Supreme Court.

Statements made to the commissioner not admissible in evidence

45 (1) A statement made or an answer given by a person during an investigation or inquiry by the commissioner is inadmissible in evidence in court or in any other proceeding, except

(a) in a prosecution for perjury in respect of sworn testimony,

(b) in a prosecution for an offence under this Act, or

(c) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of proceedings conducted before the commissioner.

Protection against libel or slander actions

46 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.

Restrictions on disclosure of information by the commissioner and staff

47 (1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

(a) conduct an investigation, audit or inquiry under this Act, or

(b) establish the grounds for findings and recommendations contained in a report under this Act.

(2.1) The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in court or in any other proceedings in respect of any records or information obtained in performing their duties or exercising their powers and functions under this Act.

(2.2) Despite subsection (2.1), the commissioner and anyone acting for or under the direction of the commissioner may give or be compelled to give evidence

(a) in a prosecution for perjury in respect of sworn testimony,

(b) in a prosecution for an offence under this Act,

(c) in an investigation, a determination or a review referred to in section 60 (1), or

(d) in an application for judicial review of a decision made under this Act.

(2.3) Subsections (2.1) and (2.2) apply also in respect of evidence of the existence of proceedings conducted before the commissioner.

(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5, or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

(5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 45.

Protection of commissioner and staff

48 No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

Delegation by commissioner

49 (1) Subject to this section, the commissioner may delegate to any person any duty, power or function of the commissioner under this Act, other than the power to delegate under this section.

(1.1) The commissioner may not delegate the power to examine information referred to in section 15 if the head of a police force or the Attorney General

(a) has refused to disclose that information under section 15, and

(b) has requested the commissioner not to delegate the power to examine that information.

(1.2) Despite section 66, the head of a police force may not delegate the power to make a request under subsection (1.1) (b).

(1.3) Despite section 66, the Attorney General may only delegate the power to make a request under subsection (1.1) (b) to the Assistant Deputy Attorney General, Criminal Justice Branch.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate.

Role of Ombudsperson

50 The Ombudsperson may not investigate any matter that the commissioner has the power to investigate or review under this Act unless the commissioner agrees.

Annual report of commissioner

51 (1) The commissioner must report annually to the Speaker of the Legislative Assembly on

(a) the work of the commissioner's office, and

(b) any complaints or reviews resulting from a decision, act or failure to act of the commissioner as head of a public body.

(2) The Speaker must lay each annual report before the Legislative Assembly as soon as possible.